Supreme Court, U.S.
FILED

No. 09-727 DEC 17 2009

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In The

Supreme Court of the United States

RODRIQUE BRADLEY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Second Circuit Court Of Appeal

PETITION FOR WRIT OF CERTIORARI

ROSS E. SHACKLETTE
Louisiana Bar No. 11,960
90 Westerfield Street
Bossier City, Louisiana 71111
Telephone: (318) 222-3256
Fax: (318) 222-3256

Attorney for Petitioner Rodrique Bradley

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Article 893.3 of the Louisiana Code of Criminal Procedure provides for a series of escalating minimum sentences depending on whether additional factors are present beyond those required to convict the defendant of the basic crime (whether a firearm is discharged and if the victim suffers bodily injury as a result). The question presented is whether the sentencing enhancements are elements which must be charged and proved to a jury beyond a reasonable doubt, or instead sentencing factors that may be found by a judge by clear and convincing evidence.

2. The Fifth Amendment to the United States Constitution provides that no one may be forced to testify against himself. The question presented is, is it harmless error to allow a prosecutor to repeatedly question a defendant about his failure to make a statement to the arresting officers when the prosecutor not only does so but also again argues defendant's failure to make a statement in his closing arguments.

LISTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case.

RODRIQUE A. BRADLEY

THE STATE OF LOUISIANA

Attorneys involved in the representation of one or more of these parties in connection with this case are as follows:

RON STAMPS
ASSISTANT DISTRICT ATTORNEY

JOHN FORD MCWILLIAMS, JR.
ASSISTANT DISTRICT ATTORNEY
(APPELLATE COUNSEL)

PAUL J. CARMOUCHE
DISTRICT ATTORNEY (at time of trial)

CHARLES R. SCOTT
DISTRICT ATTORNEY (present)

ROSS E. SHACKLETTE
RODRIQUE A. BRADLEY

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OPINIONS BELOW

The opinion of the Louisiana Court of Appeal for the Second Circuit sought to be reviewed appears as App. 1-29. This opinion was published and appears as *State v. Bradley*, 43,593 (La. App. 2d Cir. 10/29/08), 997 So.2d 694. The denial of the Motion for Rehearing by the Court of Appeals appears as App. 32. The denial of the Writ of Certiorari by the Louisiana Supreme Court appears as App. 33.

BASIS FOR JURISDICTION IN THIS COURT

Petitioner was convicted in the First Judicial District Court for Caddo Parish Louisiana of Aggravated Second Degree Battery. Petitioner timely appealed to the Louisiana Court of Appeal, which affirmed this conviction, and timely filed for a rehearing of the Court's decision, which was denied. Petitioner then timely filed for a Writ of Certiorari to the Louisiana Supreme Court which was denied by an order rendered on September 18, 2009. This petition is timely filed under Supreme Court Rule 13(1) and this court has jurisdiction pursuant to 28 U.S.C. § 1257.

Pursuant to Supreme Court Rule 14(e), Petitioner provides the following specific information:

(i) Date the judgment or order sought to be reviewed was entered:

October 29, 2008 by the Louisiana Second Circuit Court of Appeal. Writ of Certiorari denied by the Louisiana Supreme Court on September 18, 2009.

(ii) Date of any order respecting rehearing/ extension of time:

Not applicable to this Petition

(iii) Rule 12.5 considerations:

Not applicable to this Petition

(iv) Statutory provision conferring jurisdiction:

28 U.S.C. § 1257

(v) Rule 29.4 statement:

Not applicable to this Petition

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V. Criminal actions – Provisions concerning – Due process of law and just compensation.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or

property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI. Rights of the accused.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

On July 23, 2007, RODRIQUE BRADLEY was found guilty by a jury of the offense of Aggravated Second Degree Battery (Louisiana R.S. 14:34.7). (App. 38). The Court also found that Louisiana Code of Criminal Procedure Article 893.3 (App. 36) was applicable and sentenced RODRIQUE BRADLEY to fifteen (15) years at hard labor, which was the minimum sentence under Code of Criminal Procedure Article 893.3(D) and the maximum sentence under Louisiana Revised Statute 14:34.7. This sentence was automatically without benefit of parole, probation or suspension of sentence, an enhancement which the judge could not have made unless Code of Criminal

Procedure article 893.3(D) was found to be applicable. The issue of the applicability of Code of Criminal Procedure Article 893.3 was actually submitted to the jury but the jury charge was defective and did not require the jury to find all the necessary elements to support an enhancement under Louisiana Code of Criminal Procedure Article 893.3.

The Louisiana Court of Appeal found that this jury form was incorrect but held that the existence of Louisiana Code of Criminal Procedure Article 893.3 factors was not a matter which had to be determined by a jury.

RODRIQUE BRADLEY thereafter timely petitioned the Louisiana Court of Appeal for Rehearing on the issue of his constitutional entitlement to have the Louisiana Code of Criminal Procedure Article 893.3 elements decided by a jury but this motion was denied without comment. RODRIQUE BRADLEY then timely petitioned the Louisiana Supreme Court for Certiorari, which was also denied without comment.

On January 1, 2006, RODRIQUE BRADLEY was engaged in shooting fireworks with friends. While this was going on, RODRIQUE BRADLEY attempted to speak with a young lady named J.W. At this time, T.T., told RODRIQUE BRADLEY not to talk with J.W. This escalated into a physical confrontation between T.T. and RODRIQUE BRADLEY. During this confrontation both a stick and a firearm

were possessed by RODRIQUE BRADLEY and RODRIQUE BRADLEY discharged the firearm and T.T. was shot. There was conflicting testimony about whether or not this shot was fired in self-defense.

ARGUMENT

MAY IT PLEASE THE COURT:

THIS COURT SHOULD GRANT THIS PETITION TO RESOLVE A CONFLICT BETWEEN LOUISIANA COURTS AND DECISIONS FROM THIS COURT OVER WHETHER THE SIXTH AMENDMENT REQUIRES ALL ELEMENTS NECESSARY FOR A FIREARM ENHANCEMENT TO BE SUBMITTED TO A JURY.

In this case the court improperly sentenced RODRIQUE BRADLEY to a minimum sentence of fifteen years without parole, probation or suspension of sentence pursuant to Louisiana Code of Criminal Procedure Article 893.3(D) when the jury did not find the appropriate required elements under Article 893.3.

Louisiana Code of Criminal Procedure Article 893.2(D) (App. 34) provides, in pertinent part, that at any time during or at the completion of the trial the judge is authorized by Louisiana law to dispense with the hearing if he finds by clear and convincing evidence that the elements of 893.3 have been shown. If a hearing is held, the hearsay rule is not applicable

and the court may consider any evidence introduced at the trial or at the hearing of any motion. Louisiana Code of Criminal Procedure Article 893.2(B).

The Trial Court herein, pursuant to the defendant's right under the Sixth Amendment of the United States Constitution and case law such as *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-2363, 147 L.Ed.2d 435 (2000), did submit the matter of enhancement under Louisiana Code of Criminal Procedure Article 893.3 to the jury. The jury was, however, given an incorrect jury verdict form and asked only to find if a weapon was actually used or discharged. (App. 30-31). In this case, however, there was testimony that the defendant possessed both a stick and a firearm and used both of them, thus bringing into play dangers similar to those articulated by the court in *Castillo v. United States*, 530 U.S. 120, 129, 120 S.Ct. 2090 (2000) where the court noted that:

> . . . a jury may well have to decide which of several weapons the defendant actively used, rather than passively possessed. See *Bailey*, 516 U.S., at 143. And, in such a case, the sentencing judge will not necessarily know which "firearm" supports the jury's determination. Under these circumstances, a judge's later, sentencing-related decision that the defendant used the machinegun, rather than, say, the pistol, might conflict with the jury's belief that he actively used the pistol,

which factual belief underlay its firearm "use" conviction.

The jury found that a weapon was actually used or discharged by the defendant during the commission of the offense. Such a finding, however, did not comply with the provisions of Louisiana Code of Criminal Procedure Article 893.3(D), which required both the use of a firearm and that the discharge of it " . . . thereby caused bodily injury . . . ", in order to impose the 15 year sentencing enhancement. The jury thus found neither of the essential elements of (1) use of a firearm and (2) that its discharge, as opposed to use, caused the bodily injury allegedly suffered by the victim. The Trial Court, however, relied on this finding to hold at the Sentencing Hearing "That same jury also found that a firearm was used in the commission of a crime, which enhances your penalty on the aggravated second degree battery to a minimum of fifteen years."

As argued above, such a finding does not justify a fifteen (15) year minimum, without parole, under Louisiana Code of Criminal Procedure Article 893.3(D), in that there was no unequivocal finding by the jury that a firearm was involved and that it was the use or discharge of this firearm that thereby caused the injuries to the alleged victim. Likewise, the enhancement of ten (10) years provided for in Section C of 893.3 is inapplicable because the jury verdict did not find that a firearm was "actually discharged" and instead found only that a weapon was "used or discharged". Finally the enhancement under Louisiana Code of Criminal Procedure Article

893.3(B) does not apply because there was no finding that the weapon used by the Defendant was actually the firearm as opposed to the stick. The Court thus erred in finding that the jury had found that the elements of either Louisiana Code of Criminal Procedure 893.3 Sections (B), (C), or (D) had been met and that the minimum sentence it could give Mr. Bradley was 15 years. While the Trial Court did not specifically order that this sentence be served without benefit of parole, probation or suspension of sentence, Louisiana Code of Criminal Procedure Article 893.3(G) imposes such a requirement and La. R.S. 15:301.1 (App. 39) and *State v. Williams*, 00-1725 (La. 11/28/01), 800 So.2d 790 requires its imposition whether or not actually mentioned by the Trial Judge.

The Louisiana Court of Appeal quickly disposed of this argument admitting that:

> [a]lthough La. C. Cr. P. Art. 893.3(D) requires a finding that the offender used a firearm, not merely a "weapon," and a finding that the use or discharge of the firearm 'caused bodily injury,' the verdict form presented to the jury did not require the jury to make either of these findings." (App. 23).

The Court of Appeals then found that RODRIQUE BRADLEY was not entitled to have this issue decided by a jury and further found that trial counsel erred by not objecting to the erroneous charge (App. 24). The Court of Appeals further found that *Apprendi* was not applicable because the sentence of fifteen years was within the sentencing range

under La. R.S. 14:34.7(B) and thus there was no *Apprendi* violation. This was " . . . because *Apprendi* only applies when the enhanced sentence is more severe than the maximum sentence for the original offense" (App. 23). This finding ignored the fact that a sentence under La. R.S. 14:34.7(B) can be from zero to fifteen years with or without hard labor, with no restriction on eligibility for parole, probation or suspension, while a sentence under Louisiana Code of Criminal Procedure Article 893.3(D) is for a minimum of fifteen years, must be at hard labor, and must be without benefit of either parole, probation or suspension of sentence. This finding by the Court of Appeals conflicts with the fact that in Louisiana, absent statutory direction otherwise, a sentence confers with it eligibility for parole, probation and diminution of sentence. Thus in overturning a sentence granted without parole, probation or suspension of sentence the Louisiana Third Circuit Court of Appeals stated that " . . . we first note that La. R.S. 14:34 provides for a maximum incarceration sentence of ten years, but makes no mention of probation, parole or suspension restrictions. Thus, the sentence imposed exceeds the maximum incarceration sentence that may be imposed under that statute." *State v. Rogers*, 2007-0427 (La. App. 3d Cir. 10/31/07), 969 So.2d 707; other cases so holding include *State v. Lemon*, 05-567 (La. App. 5th Cir. 2/14/06), 923 So.2d 794 at 802; and *State v. Persley*, 40,271 (La. App. 2d Cir. 12/16/05), 918 So.2d 491.

This decision by the Louisiana Court of Appeal was also directly contrary to a prior decision by another Louisiana Court of Appeal in the case of *State v. Washington*, 2005-0431 (La. App. 4th Cir. 12/07/05), 921 So.2d 139 wherein the court held that under *Apprendi* any request for a sentencing enhancement under Louisiana Code of Criminal Procedure Article 893.3 had to be submitted to a jury for decision. Despite the *Washington* case having been cited by the Defendant in both his Original Brief and in his Motion for Rehearing, it is nowhere mentioned in the Appeal Court's opinion.

After the Court of Appeals ruled that the Sixth Amendment did not apply to findings under Louisiana Code of Criminal Procedure Article 893.3, RODRIQUE BRADLEY petitioned for Rehearing and urged the Court to discuss why *State v. Washington*, 2005-0431 (La. App. 4th Cir. 12/07/05), 921 So.2d 139 and *Apprendi* were not controlling in this matter. The Court of Appeals denied Rehearing without comment.

This issue was again presented to the Louisiana Supreme Court wherein RODRIQUE BRADLEY in his REASONS FOR GRANTING WRIT urged that "The Court of Appeal has erroneously interpreted and applied a law of this state in a manner inconsistent with U.S. Supreme Court precedent and has refused without explanation to follow or distinguish existing law from another Louisiana Court of Appeal. The failure of the Second Circuit Court of Appeals to follow the dictates of the U.S. Supreme Court in *Apprendi* and its refusal to follow the Fourth Circuit's

decision in *State v. Washington* will cause material injustice or significantly affect the public interest."

In the case of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) the United States Supreme Court ruled that: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

The Supreme Court further refined this ruling in *Blakely v. Washington*, 542 U.S. 296, 303, 124 S.Ct. 2531 (2004) where it stated:

> Our precedents make clear, however that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See *Ring*, supra, at 602 ("the maximum he would receive if punished according to the facts reflected in the jury verdict alone" (quoting *Apprendi*, supra, at 483)); *Harris v. United States*, 536 U.S. 545, 563 (2002) (plurality opinion) (same), cf *Apprendi*, supra, at 488 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury

> has not found all the facts "which the law makes essential to the punishment," *Bishop*, supra, 87, at 55, and the judge exceeds his proper authority.

Herein, in order to sentence RODRIQUE BRADLEY to a minimum sentence of fifteen years without benefit of parole, probation or suspension of sentence the court had to find that he discharged a firearm and that the discharge caused severe bodily injury. The jury, however, only found that a weapon, not a firearm, was used or discharged. Thus as in *Blakely*, supra, additional factors would have had to have been found by the judge in order to impose the sentence given to RODRIQUE BRADLEY and therefore the Sixth Amendment was not satisfied.

THE TRIAL COURT CLEARLY ERRED IN OVERRULING DEFENDANT'S OBJECTION TO THE PRESENTATION BY THE PROSECUTION OF EVIDENCE THAT DEFENDANT HAD PREVIOUSLY INVOKED HIS FIFTH AMENDMENT RIGHTS.

The Fifth Amendment of the United States Constitution protects all citizens from having to testify against themselves or from having to give statements to police or other law enforcement officers. Herein, the Prosecutor deliberately questioned RODRIQUE BRADLEY about his prior invocation, at the time of his arrest, of his right to remain silent. Defendant's counsel timely objected to this questioning and the trial court improperly overruled the

objection. (App. 13-14). The Prosecution then continued to ask such questions (App. 14) in an obvious attempt to impeach RODRIQUE BRADLEY's testimony and to suggest that any claim of self-defense was a recent fabrication. The Prosecutor again referred to Defendant's invocation in his closing argument. (App. 14) Defendant raised this issue by assignment of error to the Court of Appeals and in his Writ Application to the Louisiana Supreme Court.

The United States Supreme Court in the case of *Doyle v. Ohio*, 426 U.S. 610, 611, 96 S.Ct. 2240, 2241, 49 L.Ed.2d 91 (1976) found that it was improper for the prosecutor to impeach the defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest.

Herein, the Louisiana Court of Appeal found that "[t]he trial court erred in overruling the defendant's objection to the prosecutor's use of the defendant's post-*Miranda* silence; however, it was a trial error subject to the harmless error analysis". (App. 22). The court did, however, at (App. 19) find the references by the prosecutor to have been deliberate and:

> . . . plainly intended to impeach the defendant with his silence; the prosecutor sought to undermine the veracity of defendant's theory of self-defense by eliciting evidence that the defendant had not previously put forth that theory. As such,

> these questions were the sort of questions prohibited by *Doyle* [Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)] and *Sam* [State v. Sam, 412 So.2d 1082 (La. 1982)].

(matters in brackets added).

RODRIQUE BRADLEY would argue that the Louisiana Court of Appeal improperly interpreted the controlling precedents and given that this action by the Prosecutor was intentional, consisting of repeated improper questioning and references, that this failure by the Trial Judge to protect this serious constitutional right cannot be found to be harmless error.

CONCLUSION

The conflict between the Louisiana court and the decisions of this Court as to whether the Sixth Amendment applies to sentencing enhancements, including those that involve denial of probation, parole or suspension of sentence threatens the right of defendants to have all elements of their offenses decided beyond a reasonable doubt by a jury. The lower court decisions also allow prosecutors to deliberately use a defendant's invocation of his right to be silent against him. This Court should grant this

Petition and resolve the conflict between the state courts of Louisiana and this Court on these issues.

Respectfully submitted,

ROSS E. SHACKLETTE,
Bar Roll #11960
Attorney at Law
90 Westerfield Street
Bossier City, Louisiana 71111
Telephone: (318) 222-3256
Fax: (318) 222-3256

Attorney for Petitioner
Rodrique Bradley

Judgment rendered October 29, 2008.
Application for rehearing may be filed
within the delay allowed by art. 922,
La. C. Cr. P.

No. 43,593-KA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * *

STATE OF LOUISIANA Appellee

versus

RODRIQUE A. BRADLEY Appellant

* * *

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court No. 248,084

Honorable John Mosely, Jr., Judge

* * *

ROSS E. SHACKLETTE Counsel for Appellant

PAUL J. CARMOUCHE Counsel for Appellee
District Attorney

RON C. STAMPS
JOHN FORD MCWILLIAMS, JR.
Assistant District Attorneys

* * *

Before WILLIAMS, GASKINS and LOLLEY, JJ.

GASKINS, J.

Following a jury trial, the defendant, Rodrique A. Bradley, was convicted as charged of aggravated second degree battery, a violation of La. R.S. 14:34.7. The jury also found that the defendant used or discharged a weapon during the course of the offense. The court sentenced the defendant under La. C. Cr. P. art. 893.3 to serve 15 years at hard labor. The defendant appealed. We affirm the defendant's conviction and sentence.

FACTS

On January 1, 2006, 15-year-old J.W. and her teenage aunt, A.W., were walking through the Cedar Grove neighborhood in Shreveport.[1] The girls were walking to what they described as a "candy house," a home where the owner sells candy to people in the neighborhood.

According to A.W., their route took them past the home of the 23-year-old defendant. A.W. said that the defendant tried to speak with J.W. as they walked by, but J.W. ignored the defendant, and the two girls continued walking to the candy house.

The two girls met up with J.W.'s 15-year-old boyfriend, T.T. While walking back to A.W.'s house, their route took them back past the defendant's home.

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[1] The precise location of these events is not well described in the testimony.

According to the three teenagers, the defendant again spoke to J.W. as they walked by. T.T. told the defendant not to speak to J.W., and the three continued walking to A.W.'s house.

A few minutes later, when they were a few streets past the defendant's home, the teenagers saw the defendant approaching them.

According to the three juveniles, the defendant was carrying a baseball bat. T.T. testified:

> And then [the defendant] walked up and he said something, and then [J.W.] got in front of me, and [the defendant] flinched like he was going to hit her and I told her to move before she got hit. And he swung the bat and I snatched it. Then we started fighting.

The girls gave similar accounts of the beginning of the fight. J.W. testified that when she got between the defendant and her boyfriend, she told them not to fight; the defendant then responded that it had nothing to do with her, but was between him and T.T.

T.T. was able to take the bat away from the defendant, and the three juveniles said that T.T. did not attempt to use the bat during the fight. T.T. and the defendant fought with their fists, and T.T. was winning the fight, making the defendant stumble. The defendant then began to back away. The juveniles testified that the defendant then reached into his waistband and pulled out a handgun. T.T. tried to run away, but the defendant shot at T.T.; one of the

bullets struck T.T. in the groin.[2] The defendant fled from the scene.

The Shreveport Police Department (SPD) responded to the shooting. Police learned the defendant's name but were unable to locate him. Police recovered two .40 caliber shell casings from the scene.

The defendant turned himself in to the police on January 2, 2006. All three of the juveniles identified the defendant in a photo lineup. The state charged the defendant with aggravated second degree battery with the use of a gun.

At his trial, the defendant chose to testify. He said that T.T. approached him and was "talking real aggressive" and started the argument. The defendant said that T.T. started the fight by taking the baseball bat away from the him and hitting him first on the arm and then on the back, knocking him to his knees. The defendant explained that he then pulled out his gun and fired it to stop T.T. from continuing to hit him with the bat.

The jury convicted the defendant, as charged, with aggravated second degree battery. According to its verdict form, the jury also found that the

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[2] The wound caused the loss of the teen's testicles, an injury which will stunt his growth, prevent him from being a father and likely require him to have testosterone replacement therapy for the remainder of his life.

defendant actually used or discharged a weapon during the commission of the offense.

The defendant filed a motion for a post-verdict judgment of acquittal, urging that the evidence was insufficient to convict him. He also filed a motion for new trial, citing (1) the testimony of a police officer that the defendant had an outstanding warrant for domestic abuse battery, (2) questions by the prosecutor during his cross-examination of the defendant about his assertion of his Fifth Amendment rights after his arrest, and (3) a newly discovered witness.

The court held a hearing on the motions on September 17, 2007; the defendant was represented by new counsel. The motions were denied. The court sentenced the defendant to serve 15 years at hard labor, to run concurrently with any other sentence. The defendant's motion to reconsider was denied.

The defendant now appeals, urging six assignments of error.

MOTION FOR NEW TRIAL

The defendant argues that the trial court erred in denying his motion for new trial, in which he alleged that he had discovered another witness to the events whose identity was not known at the time of the trial.

Law

La. C. Cr. P. art. 851 provides, in part:

> The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.
>
> The court, on motion of the defendant, shall grant a new trial whenever:
>
> . . . .
>
> (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty. . . .

The defendant has the burden of establishing these factors. *State v. Andy*, 34,833 (La. App. 2d Cir. 8/22/01), 793 So. 2d 485, *writ denied*, 2001-2734 (La. 8/30/02), 823 So. 2d 940. La. C. Cr. P. art. 854 provides:

> A motion for a new trial based on ground (3) of Article 851 shall contain allegations of fact, sworn to by the defendant or his counsel, showing:
>
> (1) That notwithstanding the exercise of reasonable diligence by the defendant, the new evidence was not discovered before or during the trial;

> (2) The names of the witnesses who will testify and a concise statement of the newly discovered evidence;
>
> (3) The facts which the witnesses or evidence will establish; and
>
> (4) That the witnesses or evidence are not beyond the process of the court, or are otherwise available.
>
> The newly discovered whereabouts or residence of a witness do not constitute newly discovered evidence.

Discussion

At the hearing on the motion for new trial, defense counsel discussed the newly-discovered witness:

> [T]he witness informed me personally that she saw the incident herein and that what she observed was two individuals, one on the ground being beaten by the other one and two other people watching the incident take place. Now, she was unable to tell me whether that was my client who was on the ground or my client that was doing the beating, but in either case that was not in accordance with the testimony presented at trial which was allegedly that my client hit the individual one time and then the individual got the stick away from my client and threw it away.

The motion for new trial was supported by an affidavit from the defendant's post-trial counsel stating that he had been informed by the defendant's trial

counsel that he did not know of the existence of the witness.

The juvenile witnesses all explained that, once the fistfight began, T.T. prevailed over the defendant. T.T. said that the defendant fell or stumbled backwards as T.T. hit him while both J.W. and A.W. said that the defendant never fell to the ground. The newly discovered witness said that she saw the two fighting on the ground, but the witness was not able to identify which participant was on top of the other. Evidence that the fight took place partly on the ground contradicted the testimony of two of the three juvenile witnesses and was relevant to that extent. However, the witness apparently did not see either of the combatants with a weapon, nor did she see how the fight began or ended. Thus, her testimony would not have shed light upon which party was the aggressor and would have added little if anything to the evidence regarding whether the amount of force used by either party was reasonable. Consequently, we find that this witness' testimony was not such that it would "probably have changed the verdict or judgment of guilty. . . ." Therefore, the trial court did not err in denying the defendant's motion for new trial.

This assignment of error is without merit.

MOTION FOR MISTRIAL

The defendant next complains that the trial court should have granted a mistrial when the jury heard

an SPD officer testify that the defendant was wanted on a warrant for domestic battery.

At trial, the police officer testified about the circumstances surrounding the defendant's arrest for the instant offense:

> The witnesses, [A.W.] and [J.W.], had already been released from the scene. I was unable to contact them that day.
>
> The next day on the 2nd, I was called by [an SPD detective] and advised that Mr. Bradley was wishing to turn himself in. Mr. Bradley had a warrant for his arrest for domestic abuse battery.

The defendant objected to this testimony, and the trial court sustained the objection. However, the officer continued his testimony by saying: "Okay. He was booked under another charge. . . ."

The defendant did not ask for a mistrial at the time the testimony was given, but after the witness was released, the defendant moved for a mistrial. The trial court found that the comment was unsolicited and offered to admonish the jury to disregard the remark, but the defendant cited strategic reasons for refusing the admonishment.

Law

The law in this area is well settled. As this court stated in *State v. Smith*, 43,136 (La. App. 2d Cir. 4/23/08), 981 So. 2d 200:

La. C.E. art. 404(B) provides that evidence of other crimes, acts or wrongs is generally not admissible. La. C. Cr. P. art. 770(2) provides that a mistrial shall be granted upon motion of the defendant when a remark or comment is made within the hearing of the jury by the judge, district attorney, or a court official during trial or in argument and that remark refers to another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible. *State v. Ellis*, 42,520 (La. App. 2d Cir. 09/26/07), 966 So. 2d 139. For purposes of article 770, a law enforcement officer is not considered a "court official," and an unsolicited, unresponsive reference to other crimes evidence made by a law enforcement officer is not grounds for a mandatory mistrial under La. C. Cr. P. art. 770. *State v. Ellis*, *supra*; *State v. Scott*, 34,949 (La. App. 2d Cir. 01/25/02), 823 So. 2d 960, *writ denied*, 02-1622 (La. 05/16/03), 843 So. 2d 1122.

La. C. Cr. P. art. 771 sets forth permissive grounds for requesting an admonition or a mistrial when a prejudicial remark is made on grounds that do not require automatic mistrial under article 770. La. C. Cr. P. art. 775 also sets forth additional permissive grounds for mistrial. Under these articles, mistrial is at the discretion of the trial court and should be granted only where the prejudicial remarks of the witness make it impossible for the defendant to obtain a fair trial. *State v. Ellis*, *supra*. Moreover, mistrial is a drastic remedy which is only authorized

where substantial prejudice will otherwise result to the accused. *State v. Kemp*, 39,358 (La. App. 2d Cir. 03/11/05), 896 So. 2d 349, *writ denied*, 05-0937 (La. 12/09/05), 916 So. 2d 1052. A trial court's ruling denying mistrial will not be disturbed absent an abuse of discretion. *State v. Givens*, 99-3518 (La. 01/17/01), 776 So. 2d 443, *appeal after remand*, 04-0765 (La. App. 4th Cir. 10/27/04), 888 So. 2d 329, *writ denied*, 04-2919 (La. 03/18/05), 896 So. 2d 1003, *cert. denied*, 546 U. S. 867, 126 S. Ct. 154, 163 L. Ed. 2d 154 (2005); *State v. Taylor,* 30,310 (La. App. 2d Cir. 02/25/98), 709 So. 2d 883.

Even if a mistrial was warranted under article 770, 771, or 775, the failure to grant a mistrial would not result in an automatic reversal of defendant's conviction, but would be a trial error subject to the harmless error analysis on appeal. *State v. Givens, supra; State v. Johnson*, 94-1379 (La. 11/27/95), 664 So. 2d 94. Trial error is harmless where the verdict rendered is "surely unattributable to the error." *State v. Johnson, supra.*

Discussion

As noted, the court sustained the defendant's objection to the officer's remark that the defendant had an outstanding warrant for domestic abuse battery. The officer's statement was not provoked by or responsive to a question from the prosecutor; instead, the officer was relating the circumstances of the

defendant's arrest. The officer's reference was unwarranted and unnecessary but hardly so prejudicial to the defendant to warrant a mistrial. There was no pattern of questioning by the prosecutor designed to elicit inadmissible other crimes evidence, and the trial moved on with the presentation of relevant evidence. Accordingly, the trial court's denial of the motion for mistrial based on the officer's remark was not an abuse of its discretion.

This assignment of error is without merit.

DEFENDANT'S POST-*MIRANDA* SILENCE

This assignment of error is directed at the trial court's overruling of the defendant's objection to the prosecutor's questions regarding the defendant's post-*Miranda* silence. After the defendant testified that he acted in self-defense, the prosecutor asked the defendant about his failure to assert self-defense to the police. In its brief, the state argues that the defendant waived his Fifth Amendment rights by choosing to testify, that there was no evidence that the prosecutor knew his questions would elicit a reference to counsel's advice to the defendant, and that the advice of counsel was just the defendant's "excuse" for not informing the police of his self-defense claim.

During cross-examination by the prosecutor, the defendant confirmed that he turned himself in to police the day after the shooting. The following exchange then occurred:

Q: Did you have an opportunity to talk to [an SPD detective]?

A: No, sir.

Q: Did you ever tell him at anytime over a year ago that it was self-defense?

A: No, sir, I never did –

Q: Wait, wait. Wouldn't that help you; wouldn't it make sense to tell him that at that time?

A: Well, actually, I was advised by a lawyer not to make a statement.

Q: After your lawyer told you that, did anybody ever tell you, hey, man, if it was self-defense, maybe you should just go ahead on –

[Defense counsel]: Your Honor, I would object to this line of questioning.

[Prosecutor]: On what basis?

[Defense counsel]: He is stating that he was exercising his legal rights, and –

[Prosecutor]: And I believe, Your Honor, I believe once he takes the stand, he waives it.

The Court: Approach the bench.

[Whereupon a side-bar discussion off the record was held.]

[Prosecutor]: Your Honor, it is the State's –

The Court: I will overrule the objection.

[Prosecutor]: Thank you, Your Honor.

The Court: All right.

Q. [Prosecutor]: But you never told anybody it was self-defense, about the self-defense story, did you?

A: (No response.)

Q: That's a yes or no question.

A: No, sir.

The defendant objected, as noted in the quotation, but did not request an admonition or a mistrial.

In closing argument, the prosecutor said:

> So what reason would [the juveniles] have to get up and concoct this story that all just happens to come together, it's the same story they all told the police officer. He never mentions this whole story of self-defense. Never mentioned it. Never mentioned it.

No evidence was presented regarding when, or if, the defendant was given his *Miranda* rights. No jury charge was given about the impermissibility of drawing an inference from the defendant's post-*Miranda* silence.

Law

In 1976, the United States Supreme Court in *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. E. 2d 91 (1976), mandated that it was reversible error for a defendant testifying at his trial to be

impeached with his post-*Miranda* silence. The highest court reasoned:

> The warnings mandated by [*Miranda*] . . . require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to a retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested, Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. [Citations omitted]

The rule imposed by *Doyle* was not applied to pre-arrest statements. *Jenkins v. Anderson*, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980).

Louisiana, in applying *Doyle*, recognized some caveats. When the prosecutor referenced post-*Miranda* silence in *State v. Kersey*, 406 So. 2d 555 (La. 1981), the Louisiana Supreme Court reasoned that the

prosecutor made a reference to the defendant's post-*Miranda* silence to show that the jury had all the statements made by the defendant. That conviction was upheld. In *State v. Bell*, 446 So. 2d 1191 (La. 1984), the trial court found the prosecutor's reference to the defendant's post-*Miranda* silence was permissible to rebut the defendant's assertion that the state failed to properly investigate. The failure to contemporaneously object to a *Doyle* violation in *State v Arvie*, 505 So. 2d 44 (La. 1987), resulted in the conviction being upheld.[3]

In 1993, the United States Supreme Court reasoned that a harmless error review applied to *Doyle* violations on direct appeal in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).[4] The court pointed out that a *Doyle* error fits in the category of constitutional violations which are characterized as "trial error," and concluded that it was amenable to a harmless error standard. The court also recognized that the Constitution does not prohibit the use, for impeachment purposes, of a defendant's silence prior to arrest or after arrest if no *Miranda* warnings are given. Post-*Brecht*, this court applied the harmless error rule to a *Doyle* violation in

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[3] In a case where there was no reason for the questions but to impeach the defendant with his post-*Miranda* statement, the court applied the *Doyle* rule and reversed the conviction. *State v. Sam*, 412 So. 2d 1082 (La. 1982).

[4] The *Brecht* decision concluded that a different standard of review is appropriate for federal *habeas corpus* review.

State v. Lee, 38,114 (La. App. 2d Cir. 3/3/04), 868 So. 2d 256, *writ denied*, 2004-1128 (La. 10/8/04), 883 So. 2d 1027, where we found no reversible error in light of the overwhelming evidence of guilt.

La. C.Cr.P. art. 771 – which sets forth the permissive grounds for requesting an admonition or a mistrial when a prejudicial remark is made on grounds that do not require an automatic mistrial under La. C. Cr. P. art. 770 – is the applicable provision concerning the proper remedy where references are made to a defendant's post-arrest silence. *State v. Kersey*, *supra*; *State v. Jones*, 40,652 (La. App. 2d Cir. 1/25/06), 920 So. 2d 941, *writ denied*, 2006-1164 (La. 12/15/06), 944 So. 2d 1278. However, if the trial court does not respond in any positive way to the defendant's valid objection, an additional motion for a mistrial would be superfluous in order to preserve the issue for appellate review. *See, e.g., State v. Mack*, 37,174 (La. App. 2d Cir. 6/27/03), 850 So. 2d 1035, *writ denied*, 2003-2122 (La. 1/16/04), 864 So. 2d 628: "[A]s held by the supreme court in *State v. Baylis*, 388 So. 2d 713 (La. 1980), when a defendant's objection to improper remarks is overruled, he is not required to make a useless motion for admonition or a mistrial to preserve his rights on appeal"; *State v. Grant*, 531 So. 2d 1121 (La. App. 4th Cir.1988), *writ denied*, 567 So. 2d 1117 (La.1990): "When a defendant objects to improper remarks and the objection is overruled, the defendant is not required to move for an admonition or a mistrial to preserve his rights on appeal."

Discussion

The record is silent as to whether the defendant was given his Miranda rights. We will, however, examine this issue under the assumption that the defendant was given his *Miranda* rights after his arrest and that he was silent when questioned by the police.

In the instant case, the defendant made a timely objection to the prosecutor's question about the defendant's silence, but the trial court erroneously overruled that objection. As a result, the defendant was forced to admit to the jury that he never offered the police an exculpatory statement. Since the trial court overruled the defendant's objection and did not offer an admonition to the jury that no inference could be drawn from the defendant's choice not to speak to police after being given his *Miranda* rights, the defendant here, unlike the one in *Kersey,* did not get "all the relief to which he was entitled." In view of the trial court's failure to respond positively to the defendant's valid objection, a motion for mistrial would have been superfluous. As a result, we find that the defendant's timely objection was sufficient to preserve this error for appellate review – even though the defendant did not make a motion for mistrial – because the trial court overruled the defendant's objection.

Although the prosecutor's questions were permissible as to the defendant's pre-*Miranda* silence, the questions as to his post-*Miranda* silence were not.

They were plainly intended to impeach the defendant with his silence; the prosecutor sought to undermine the veracity of the defendant's theory of self-defense by eliciting evidence that the defendant had not previously put forth that theory. As such, these questions were the sort of questions prohibited by *Doyle* and *Sam*.

However, as discussed *supra*, a *Doyle* violation is a trial error. A trial error does not provide grounds for reversal of a defendant's conviction and sentence unless it affects substantial rights of the accused. La. C.Cr.P. art. 921; *State v. Johnson*, 94-1379 (La. 11/27/95), 664 So. 2d 94. The test is whether there is a reasonable possibility the error might have contributed to the conviction and whether the court can declare a belief that the error is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), *rehearing denied*, 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241 (1967); *State v. Juniors*, 2003-2425 (La. 6/29/05), 915 So. 2d 291, *cert. denied*, 547 U.S. 1115, 126 S. Ct. 1940, 164 L. Ed. 2d 669 (2006). The reviewing court must find the verdict actually rendered by this jury was surely unattributable to the error. *Johnson*, *supra*; *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182 (1993).

The testimony of the state's three juvenile witnesses was consistent that the defendant, armed with a bat and a gun, pursued them several streets away from the site of the initial incident in which the defendant and T.T. exchanged words over the defendant

talking to J.W. When J.W. tried to prevent a fight by standing between the two young men, the defendant told her the incident had nothing to do with her. All parties – including the defendant himself – agree that when the verbal argument began the defendant was armed with a bat, which T.T. subsequently took away from him. All parties also agree that a fight ensued in which T.T. got the upper hand. The three juvenile witnesses testified that the defendant initiated the confrontation, i.e., "brought on the difficulty" under La. R.S. 14:21, and that T.T. hit the defendant with his fists, not the bat; only the defendant testified that T.T. struck him with the bat. However, all of the witnesses agreed that the shots were fired by the defendant during the fight. The three juvenile witnesses testified that the defendant shot T.T. as the defendant was trying to run away. The defendant insisted that, despite his coincidental possession of a gun and a bat, he was not the aggressor. The defendant testified that the shooting was, in his words, merely a "reaction" and that if someone comes up and "just started, the first thing you're going to do is try to get away, but **during** the getting away, you try to defend yourself." [Emphasis added.] (This actually tends to corroborate the juvenile witnesses' testimony about the defendant running and shooting back at T.T.) Thus, the defendant's own statements show that he did not withdraw "from the conflict in good faith and in such a manner that his adversary

knows or should know that he desires to withdraw and discontinue the conflict," as required of an aggressor by La. R.S. 14:21.[5] It was only after this portion of his testimony that the prosecutor questioned him about his pre-*Miranda* and post-*Miranda* silence.

The state's references to the defendant's post-*Miranda* silence were brief and intermingled with the permissible references to his pre-*Miranda* silence. When answering the prosecutor's question as to why he made no statement after his arrest claiming self-defense, the defendant responded straightforwardly

---

[5] The standard of proof when a defendant claims self-defense in a non-homicide case is a preponderance of the evidence. The state must then prove beyond a reasonable doubt that the defendant did not act in self-defense. *State v. Ford*, 42,928 (La. App. 2d Cir. 2/13/08), 976 So. 2d 321. The issue of self-defense requires a dual inquiry, an objective inquiry into whether the force used was reasonable under the circumstances and a subjective inquiry into whether the force was apparently necessary. *State v. Kirkland*, 42,397 (La. App. 2d Cir. 8/15/07), 962 So. 2d 1173, *writ denied*, 2007-1928 (La. 2/15/08), 976 So. 2d 174; *State v. Ford, supra*. A person who is the aggressor or who brings on the difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict. La. R.S. 14:21; *State v. Ford, supra*.

Even had the defendant shown that he withdrew from the conflict and done so in such a manner that the victim knew or should have known of the withdrawal, the defendant would still have to prove that the shooting was reasonable and apparently necessary.

that his lawyer had advised against any statement, a completely plausible and understandable assertion.

The trial court erred in overruling the defendant's objection to the prosecutor's use of the defendant's post-*Miranda* silence; however, it was a trial error subject to the harmless error analysis. We find that in the instant case the jury's verdict was "surely unattributable to the error" given the evidence as a whole, the testimony demonstrating that the defendant was the aggressor who brought on the difficulty, and the defendant's own admissions about his failure to withdraw from the conflict. Accordingly, the defendant is not entitled to a reversal of his conviction on this basis.

COMPLIANCE WITH LA. C. CR. P. ART. 893.3(D)

The defendant urges that the trial court erred in accepting the jury's finding that the defendant had used or discharged a weapon because the verdict did not comply with the requirements of La. C. Cr. P. art. 893.3(D). It provides:

> D. If the court finds by clear and convincing evidence that a firearm was actually used or discharged by the defendant during the commission of the felony for which he was convicted, and thereby caused bodily injury, the court shall impose a term of imprisonment of fifteen years; however, if the maximum sentence for the underlying felony is less than fifteen years, the court shall impose the maximum sentence.

As noted, the jury's verdict form provided:

> 1. We, the jury, find the defendant, Rodrique A. Bradley, guilty as charged of AGGRAVATED SECOND DEGREE BATTERY;
>
> (a) Do you (the Jury) find that a weapon was actually used or discharged by the defendant during the commission of the offense. YES _X_ NO _____

The defendant did not object to the jury charge or to this form prior to submission of the case to the jury.

The offense of aggravated second degree battery carries a sentence of imprisonment at hard labor for up to 15 years. La. R.S. 14:34.7(B). The defendant's sentence, although apparently enhanced under La. C. Cr. P. art. 893.3, is within this range, so there is no violation in this case of the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-2363, 147 L. Ed. 2d 435 (2000), because *Apprendi* only applies when the enhanced sentence is more severe than the maximum sentence for the original offense.

Although La. C. Cr. P. art. 893.3(D) requires a finding that the offender used a firearm, not merely a "weapon," and a finding that the use or discharge of the firearm "caused bodily injury," the verdict form presented to the jury did not require the jury to make either of those findings. Nevertheless, the defendant's counsel had the opportunity to consider both the charge to the jury and the verdict form before the

case was submitted to the jury and specifically denied any objection to either the charge or the verdict form. In fact, the defendant admitted to shooting the victim, although the defendant claimed that the shooting was done in self-defense. In the absence of any objection, and because the sentence imposed is within the unenhanced statutory range for the crime and the victim of this offense was seriously and permanently injured during the offense, we find that this assignment of error is without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

In two assignments of error, the defendant argues that his trial attorney was ineffective by failing to object to the alleged misstatements of the law propounded by the prosecutor. Specifically, he refers to the prosecutor's statements that, in claiming self-defense, one cannot use greater force than is directed against the one claiming self-defense and that an aggressor can never claim self-defense.

During closing arguments, the prosecutor gave his interpretations of the law to the jury, including these statements:

> Judge Mosely is going to instruct you on the law, and he is going to tell you something regarding the law. The law is this: That a person who is an aggressor or who brings on a difficulty cannot claim the right of self-defense. That is the law unless he withdraws from the conflict with good faith and such in a manner that he lets the person know.

. . . .

The law is clear. If you are the aggressor, you bring it on – guess what? – you can't claim self-defense.

. . . .

The other thing is this: The judge will tell you, assuming for the sake of argument that there may be some scintilla of veracity as it comes to this whole self-defense, the use of force and violence is justifiable when committed for the purpose of preventing a forcible offense against a person or forcible offense or trespass against property of a person in lawful possession, provided that the force or violence that is used is reasonable and necessary. Let's assume, again, we buy his self-defense argument, that simply means this: If you're going from here with our fists, you can't use a gun. You can only use the force that is being used against you.

. . . .

. . . I say one thing to you before you deliberate, an aggressor cannot claim self-defense. An aggressor cannot claim self-defense. Everybody says he left wherever he was, where the initial altercation occurred and found the young man and the young lady. . . . That sounds like an aggressor to me. An aggressor cannot claim self-defense in the law. The law. And it's as simple as that.

The trial court instructed the jury about the law, including the appropriate passages concerning the use of force in self-defense, specifically La. R.S. 14:19(A)[6] and La. R.S. 14:21[7].

Law

The right of a defendant in a criminal proceeding to the effective assistance of counsel is mandated by the Sixth Amendment to the U.S. Constitution. *State v. Wry*, 591 So. 2d 774 (La. App. 2d Cir. 1991). A claim of ineffectiveness of counsel is analyzed under the two-prong test developed by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish that counsel was ineffective, a defendant first must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. The relevant inquiry is whether counsel's

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[6] A. The use of force or violence upon the person of another is justifiable when committed for the purpose of preventing a forcible offense against the person or a forcible offense or trespass against property in a person's lawful possession, provided that the force or violence used must be reasonable and apparently necessary to prevent such offense. . . .

[7] A person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict.

representation fell below the standard of reasonableness and competency as required by prevailing professional standards demanded for attorneys in criminal cases. *State v. Moore*, 575 So. 2d 928 (La. App. 2d Cir. 1991). The assessment of an attorney's performance requires his conduct to be evaluated from counsel's perspective at the time of the occurrence. A reviewing court must give great deference to trial counsel's judgment, tactical decisions, and trial strategy, strongly presuming he has exercised reasonable professional judgment. *State v. Moore, supra*; *State v. Johnson*, 43,066 (La. App. 2d Cir. 4/9/08), 981 So. 2d 139.

Secondly, a defendant must show that counsel's deficient performance prejudiced his defense. This element requires a showing the errors were so serious as to deprive the defendant of a fair trial, i.e., a trial whose result is reliable. *Strickland v. Washington, supra*. The defendant must prove actual prejudice before relief will be granted. It is not sufficient for the defendant to show the error had some conceivable effect on the outcome of the proceedings. Rather, he must show that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the trial would have been different. See *Strickland v. Washington, supra*; *State v. Pratt*, 26,862 (La. App. 2d Cir. 4/5/95), 653 So. 2d 174, *writ denied*, 95-1398 (La. 11/3/95), 662 So. 2d 9.

Claims of ineffective assistance of counsel are more properly raised in an application for post-conviction relief in the trial court because it provides

the opportunity for a full evidentiary hearing under La. C. Cr. P. art. 930. *State v. Lane*, 40,816 (La. App. 2d Cir. 4/12/06), 927 So. 2d 659, *writs denied*, 2006-1453 (La. 12/15/06), 944 So. 2d 1283, and 2006-2502 (La. 5/4/07), 956 So. 2d 599. When the record is sufficient, however, allegations may be resolved on direct appeal in the interest of judicial economy. *State v. Ratcliff*, 416 So. 2d 528 (La. 1982); *State v. Lane*, *supra*.

Discussion

In this case, the defendant's claims can be resolved on the appellate record. The prosecutor repeated several times the statement that an aggressor cannot claim self-defense, and he also gave a narrow opinion about the law regarding the appropriate use of force in self-defense. However, the trial court correctly and fully instructed the jury on both of these points, and the prosecutor's statements were simply made in furtherance of the state's view of the evidence; to wit, that the defendant attacked the victim and shot the victim only after the defendant began to lose the fight that he started.

The prosecutor's arguments were within the permissible scope of argument under La. C. Cr. P. art. 774; see also *State v. Gage*, 42,279 (La. App. 2d Cir. 8/29/07), 965 So. 2d 592, *writ denied*, 2007-1910 (La. 2/22/08), 976 So. 2d 1283. Furthermore, we find the prosecutor made no misstatement of the law in his closing argument.

These assignments of error are without merit.

CONCLUSION

The defendant's conviction and sentence are affirmed.

AFFIRMED.

STATE OF LOUISIANA	*	NUMBER: 248,084
VERSUS	*	FIRST JUDICIAL DISTRICT COURT
RODRIQUE A. BRADLEY	*	CADDO PARISH, LOUISIANA
PERMANENT ASSIGNMENT	*	SECTION "2"

RESPONSIVE VERDICTS FOR THE CHARGE OF AGGRAVATED SECOND DEGREE BATTERY

(Filed Jul. 24, 2007)

The responsive verdicts of the AGGRAVATED SECOND DEGREE BATTERY reads:

1. We, the jury, find the defendant, RODRIQUE A. BRADLEY, guilty as charged of AGGRAVATED SECOND DEGREE BATTERY;

   (a). Do you (the Jury) find that a weapon was actually used or discharged for the defendant during the commission of the offense. YES _X_ NO ___; or

   July _24_, 2007 /s/ Vickie L. Moore
   FOREMAN

2. We, the jury, find the defendant, RODRIQUE A. BRADLEY, guilty of AGGRAVATED BATTERY;

   (a). Do you (the Jury) find that a weapon was actually used or discharged for the defendant during the commission of the offense. YES ___ NO ___; or

   July ____, 2007 _____
   FOREMAN

3. We, the jury, find the defendant, RODRIQUE A. BRADLEY, guilty of SECOND DEGREE BATTERY;

(a). Do you (the Jury) find that a weapon was actually used or discharged for the defendant during the commission of the offense. YES ___ NO ___; or

July ____, 2007 _____
FOREMAN

4. We, the jury, find the defendant, RODRIQUE A. BRADLEY, guilty of SIMPLE BATTERY; or

July ____, 2007 _____
FOREMAN

5. We, the jury, find the defendant, RODRIQUE A. BRADLEY, NOT GUILTY.

July ____, 2007 _____
FOREMAN

STATE OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
430 Fannin Street
Shreveport, LA. 71101
(318) 227-3700

Ross Edward Shacklette
ATTORNEY AT LAW
90 Westerfield Street
Bossier City LA 71111-0000

REHEARING ACTION: November 25, 2008

Docket Number: 43,593-KA

STATE OF LOUISIANA

VERSUS

RODRIQUE A. BRADLEY

BEFORE JUDGES:

Henry N. Brown Jr.
Felicia Toney Williams
Gay C. Gaskins
Charles B. Peatross
John Larry Lolley

As counsel of record in the captioned case, you are hereby notified that the application for rehearing filed by Rodrique A. Bradley has this day been

DENIED.

FOR THE COURT

Diana Pratt-Wyatt

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS. NO. 2008-K-2997

RODRIQUE A. BRADLEY

IN RE: Bradley, Rodrique A.; – Defendant; Applying For Writ of Certiorari and/or Review; Parish of Caddo, 1st Judicial District Court Div. G, No. 248,084; to the Court of Appeal, Second Circuit, No. 43,593-KA;

September 18, 2009

Denied.

JPV

CDK

BJJ

JTK

JLW

GGG

BJ

Louisiana Code of Criminal Procedure Article 893.2. Discharge, use, or possession of firearm in commission of a felony or a specifically enumerated misdemeanor; hearing

A. If a motion was filed by the state in compliance with Article 893.1, the court may conduct a contradictory hearing following conviction to determine whether a firearm was discharged, or used during the commission of the felony or specifically enumerated misdemeanor, or actually possessed during the commission of a felony which is a crime of violence as defined by R.S. 14:2(13), felony theft, production, manufacturing, distribution, dispensing, or possession with intent to produce, manufacture, distribute, or dispense a controlled dangerous substance in violation of the Uniform Controlled Dangerous Substances Law, or specifically enumerated misdemeanor and whether the mandatory minimum sentencing provisions of Article 893.3 have been shown to be applicable.

B. The court may consider any evidence introduced at the trial on the merits, at defendant's guilty plea, or at the hearing of any motion filed in the case. The court may also consider any other relevant evidence presented by either party at the contradictory hearing. The hearsay rule shall not be applicable at such contradictory hearings.

C. The burden shall be upon the state to establish by clear and convincing evidence that the defendant actually discharged, used, or actually possessed a firearm during the commission of the

felony or specifically enumerated misdemeanor for which the defendant was convicted and that any conditions otherwise required by the mandatory minimum sentencing provisions of Article 893.3 are shown to be applicable.

D. If at any time during or at the completion of the trial, the court finds by clear and convincing evidence that the state has established that a firearm was discharged or used during the commission of the felony or specifically enumerated misdemeanor or actually possessed during the commission of a felony which is a crime of violence as defined by R.S. 14:2(13), a felony theft, production, manufacturing, distribution, dispensing, or possession with intent to produce, manufacture, distribute, or dispense a controlled dangerous substance in violation of the Uniform Controlled Dangerous Substances Law, or specifically enumerated misdemeanor, and that the mandatory minimum sentencing provisions of Article 893.3 have been shown to be applicable, the court may dispense with the hearing provided for in Paragraph A of this Article.

E. The motion shall be heard and disposed of prior to the imposition of sentence.

Louisiana Code of Criminal Procedure Article 893.3. Sentence imposed on felony or specifically enumerated misdemeanor in which firearm was possessed, used, or discharged

A. If the court finds by clear and convincing evidence that the offender actually possessed a firearm during the commission of the felony or specifically enumerated misdemeanor for which he was convicted, the court shall impose a term of imprisonment of two years; however, if the maximum sentence for the underlying offense is less than two years, the court shall impose the maximum sentence.

B. If the court finds by clear and convincing evidence that the offender actually used a firearm in the commission of the felony or specifically enumerated misdemeanor for which he was convicted, the court shall impose a term of imprisonment of five years; however, if the maximum sentence for the underlying offense is less than five years, the court shall impose the maximum sentence.

C. If the court finds by clear and convincing evidence that the offender actually discharged a firearm in the commission of the felony or specifically enumerated misdemeanor for which he was convicted, the court shall impose a term of imprisonment of ten years; however, if the maximum sentence for the underlying offense is less than ten years, the court shall impose the maximum sentence.

D. If the court finds by clear and convincing evidence that a firearm was actually used or discharged by the defendant during the commission of

the felony for which he was convicted, and thereby caused bodily injury, the court shall impose a term of imprisonment of fifteen years; however, if the maximum sentence for the underlying felony is less than fifteen years, the court shall impose the maximum sentence.

E. (1)(a) Notwithstanding any other provision of law to the contrary, if the defendant commits a felony with a firearm as provided for in this Article, and the crime is considered a violent felony as defined in this Paragraph, the court shall impose a minimum term of imprisonment of ten years. In addition, if the firearm is discharged during the commission of such a violent felony, the court shall impose a minimum term of imprisonment of twenty years.

(b) A "violent felony" for the purposes of this Paragraph is: second degree sexual battery, aggravated burglary, carjacking, armed robbery, second degree kidnapping, manslaughter, or forcible rape.

(2) A sentence imposed under this Paragraph shall be without benefit of parole, probation or suspension of sentence.

F. A sentence imposed under the provisions of this Article shall not be suspended and shall be imposed in the same manner as provided in the felony for which the defendant was convicted.

G. A defendant sentenced under the provisions of this Article shall not be eligible for parole during the period of the mandatory minimum sentence.

H. If the court finds that a sentence imposed under provisions of this Article would be excessive, the court shall state for the record the reasons for such finding and shall impose the most severe sentence which is not excessive.

I. For the purpose of this Article, "firearm" is defined as an instrument used in the propulsion of shot, shell, or bullets by the action of gunpowder exploded within.

J. For purposes of this Article, the specifically enumerated misdemeanors to which these sentencing provisions are applicable shall be:

(1) R.S. 14:79, violation of a protective order, involving an assault or battery of the person protected.

(2) R.S. 14:67, theft.

(3) R.S. 14:35, simple battery.

(4) R.S. 14:37, aggravated assault.

(5) R.S. 14:40.2, stalking.

(6) R.S. 14:35.3, domestic abuse battery.

Louisiana Revised Statute 14:34.7. Aggravated second degree battery

A. (1) Aggravated second degree battery is a battery committed with a dangerous weapon when the offender intentionally inflicts serious bodily injury.

(2) For purposes of this Section, "serious bodily injury" means bodily injury which involves unconsciousness, extreme physical pain or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death.

B. Whoever commits the crime of aggravated second degree battery shall be fined not more than ten thousand dollars or imprisoned, with or without hard labor, for not more than fifteen years, or both.

Louisiana Revised Statute 15:301.1. Sentences without benefit of probation, parole, or suspension of sentence; correction

A. When a criminal statute requires that all or a portion of a sentence imposed for a violation of that statute be served without benefit of probation, parole, or suspension of sentence, each sentence which is imposed under the provisions of that statute shall be deemed to contain the provisions relating to the service of that sentence without benefit of probation, parole, or suspension of sentence. The failure of a sentencing court to specifically state that all or a portion of the sentence is to be served without benefit of probation, parole, or suspension of sentence shall not in any way affect the statutory requirement that all or a portion of the sentence be served without benefit of probation, parole, or suspension of sentence.

B. If a sentence is inconsistent with statutory provisions, upon the court's own motion or motion of the district attorney, the sentencing court shall amend the sentence to conform to the applicable statutory provisions. The district attorney shall have standing to seek appellate or supervisory relief for the purpose of amending the sentence as provided in this Section.

C. The provisions of this Section shall apply to each provision of law which requires all or a portion of a criminal sentence to be served without benefit of probation, parole, or suspension of sentence, or of any one of them, any combination thereof, or any substantially similar provision or combination of substantially similar provisions.

D. Any amendment to any criminal sentence as authorized by the provisions of this Section shall be completed within one hundred eighty days of the initial sentencing.

Supreme Court, U.S.
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No. 09-727

In The
Supreme Court of the United States

RODRIQUE BRADLEY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Second Circuit Court Of Appeal

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES REX SCOTT
Counsel of Record
Caddo Parish District Attorney
cscott@caddoda.com

SUZANNE M. OWEN
Assistant District Attorney
501 Texas Street
Shreveport, LA 71101
(318) 429-7618

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

On January 1, 2006, 15-year-old J.W. and her teenage aunt, A.W., were walking through their neighborhood in Shreveport, Louisiana. The girls were walking to what they described as a "candy house," a home where the owner sells candy to people in the neighborhood. Their route took them past the home of the then 23-year-old petitioner, with whom they were not acquainted. A.W. said that petitioner tried to speak with J.W. as they walked by, but J.W. ignored petitioner, and the two girls continued walking to the candy house.

The two girls met up with J.W.'s 15-year-old boyfriend, T.T., who lived nearby. While walking back to A.W.'s house, their route took them back past petitioner's home. According to the three teenagers, petitioner again spoke to J.W. as they walked by. T.T. told petitioner not to speak to J.W., and the three continued walking to A.W.'s house.

As they rounded a corner a few minutes later, the teenagers were alerted to petitioner's approach behind them. According to the three juveniles, petitioner was carrying a baseball bat. T.T. testified:

> And then [petitioner] walked up and he said something, and then [J.W.] got in front of me, and [petitioner] flinched like he was going to hit her and I told her to move before she got hit. And he swung the bat and I snatched it. Then we started fighting.

The girls gave similar accounts of the beginning of the fight. J.W. testified that when she got between petitioner and her boyfriend, she told them not to fight; petitioner then responded that it had nothing to do with her, but was between him and T.T.

T.T. was able to take the bat away from petitioner, and all three juveniles said that T.T. did not attempt to use the bat during the fight. T.T. and petitioner fought with their fists, with T.T. prevailing as petitioner stumbled back. Petitioner then began to back away. The juveniles testified that petitioner then reached into his waistband and pulled out a handgun. T.T. tried to run away, but the three teenagers and petitioner agreed that petitioner shot at T.T.; one of the bullets struck T.T. in the groin. Petitioner fled from the scene. Police recovered two .40 caliber shell casings from the scene, confirming that shots had been fired.

T.T. was taken to the hospital where he underwent surgery. One testicle was completely destroyed and only 1% of the other testicle was able to be saved. The jury heard from the treating surgeon how these injuries will have life-long effects on T.T., including precluding the possibility of fatherhood.

At his trial, petitioner chose to testify. He said that T.T. approached him and was "talking real aggressive" and started the argument. Petitioner said that T.T. started the fight by taking the baseball bat away from him and hitting him first on the arm and then on the back, knocking him to his knees.

Petitioner explained that he then pulled out his gun and fired it to stop T.T. from continuing to hit him with the bat. None of the state's witnesses described T.T. defending himself with anything other than his fists. Nor was petitioner able to adequately explain why he confronted T.T. while armed with a baseball bat and a loaded gun.

The jury found petitioner guilty as charged of Aggravated Second Degree Battery. The jury also found the special circumstance that a weapon was used or discharged by petitioner during the commission of the offense. The trial court found that this satisfied the requirement of La. C.Cr.P. art. 893.3 which provides levels of sentence enhancement for offenses involving firearms. Petitioner was sentenced to fifteen years imprisonment at hard labor subject to the conditions provided by law.

CORRECTION OF PETITIONER'S MISSTATEMENTS

1. Statement of the Case

Petitioner asserts that after the verbal disagreements between petitioner and the victim, "This escalated into a physical confrontation between T.T. and Rodrique Bradley. During this confrontation both a stick and a firearm were possessed by Rodrique Bradley and Rodrique Bradley discharged the firearm and T.T. was shot." (Pet.'s App. p. 4)

However, the trial record reveals that the petitioner was carrying not a stick but a baseball bat. Furthermore, this was not a physical confrontation between petitioner and T.T. but rather an attack by petitioner upon T.T.

2. Sentencing enhancement

Petitioner states: "The Louisiana Court of Appeal found that this jury form was incorrect but held that the existence of Louisiana Code of Criminal Procedure Article 893.3 factors was not a matter which had to be determined by a jury." (Pet.'s App. p. 4)

The actual determination of the Court of Appeal was not that broad. In its Opinion, it was stated:

> Although La. C.Cr.P. art. 893.3(D) requires a finding that the offender used a firearm, not merely a "weapon," and a finding that the use or discharge of the firearm "caused bodily injury," the verdict form presented to the jury did not require the jury to make either of those findings. Nevertheless, the defendant's counsel had the opportunity to consider both the charge to the jury and the verdict form before the (Pet.'s App. 23) case was submitted to the jury and specifically denied any objection to either the charge or the verdict form. In fact, the defendant admitted to shooting the victim, although the defendant claimed that the shooting was done in self-defense. In the absence of any objection, and because the

> sentence imposed is within the unenhanced statutory range for the crime and the victim of this offense was seriously and permanently injured during the offense, we find that this assignment of error is without merit. (Pet.'s App. 24)

ARGUMENT

MAY IT PLEASE THE COURT:

I. PETITIONER'S SENTENCE DOES NOT VIOLATE THE RULE PRONOUNCED BY THIS COURT IN *APPRENDI V. NEW JERSEY* AS IT DID NOT EXCEED THE STATUTORY MAXIMUM AND ANY VIOLATION DOES NOT REQUIRE REVERSAL UNDER THE HARMLESS-ERROR RULE

As a basis for seeking a writ of certiorari, petitioner argues that there is a conflict between the Louisiana courts and the decisions of this Court, notably *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-2363, 147 L.Ed. 2d 435 (2000) over whether the Sixth Amendment requires all elements necessary for a firearm sentence enhancement to be submitted to a jury. The original sentencing scheme as set forth in the Louisiana Criminal Code called for the presiding judge to make a determination as to whether the sentencing factors had been adequately proven. In practice, Louisiana courts attempt to operate in accord with the jurisprudence of this Court. As shown below, respondent respectfully

asserts that the decisions of Louisiana courts, including the instant case, are in agreement with the jurisprudence of this honorable Court.

Respondent also disagrees with petitioner's contention that the rule set forth in *Apprendi* necessarily applies in this case. The offense of Aggravated Second Degree Battery carries a sentence of imprisonment at hard labor for up to fifteen years. La. R.S. 14:34.7(B). Petitioner's sentence of fifteen years at hard labor, although enhanced under La. C.Cr.P. art. 893.3, is within this range. Petitioner argues that because his sentence is subject to the statutory conditions of no suspension of sentence or parole pursuant to La. C.Cr.P. art. 893.3, it exceeds the statutory maximum of La. R.S. 14:34.7, for which suspension of sentence and parole are possible for *some* offenders. Whether petitioner would be otherwise eligible for suspension of sentence or parole is an open question. As this determination is not one that can be made by the sentencing judge, but instead by administrative procedures within the Department of Corrections, petitioner has not shown that the exclusion of the possibility of suspension of sentence or parole increased his maximum sentence exposure. Thus, there is no violation in this case of the rule of *Apprendi*, because *Apprendi* only applies when the enhanced sentence is more severe than the maximum sentence for the original offense.

Furthermore, even should *Apprendi* be found applicable, it is subject to harmless-error analysis. "Failure to submit a sentencing factor to the jury, like

failure to submit an element to the jury, is not structural error." *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed. 2d 466 (2006). When determining if an error is harmless, the test is whether there is a reasonable possibility the error might have contributed to the conviction and whether the court can declare a belief that the error is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967), *rehearing denied*, 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed. 2d 241 (1967). The circumstances extant in this case lead to the conclusion that the error, if any, in this case was harmless. The verdict form presented to the jury (Pet.'s App. 30), although not in perfect form, was such that all elements relevant to petitioner's conviction and sentence were considered by the jury and found beyond a reasonable doubt.

Petitioner was charged with Aggravated Second Degree Battery, a felony offense under the Louisiana Criminal Code. Battery is defined in Revised Statute 14:33 of the Louisiana Criminal Code as the intentional use of force or violence upon the person of another. The elements of Aggravated Second Degree Battery are found in Louisiana Revised Statute 14:34.7, which reads as follows:

> A. (1) Aggravated second degree battery is a battery committed with a dangerous weapon when the offender intentionally inflicts serious bodily injury.
>
> (2) For purposes of this Section, "serious bodily injury" means bodily injury

> which involves unconsciousness, extreme physical pain or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death.
>
> B. Whoever commits the crime of aggravated second degree battery shall be fined not more than ten thousand dollars or imprisoned, with or without hard labor, for not more than fifteen years, or both.

The Bill of Information charging petitioner with this offense contains the following language:

> "Rodrique A. Bradley committed the offense of R.S. 14:34.7 Aggravated Second Degree Battery in that he committed a battery upon [T.T.] with a dangerous weapon, to-wit: GUN, where Rodrique A. Bradley intentionally inflicted serious bodily injury . . . "

For the jury to convict petitioner of this offense, they had to find beyond a reasonable doubt that petitioner committed a battery upon T.T. with a gun and thereby intentionally inflicted serious bodily injury. "Dangerous weapon" is a term defined in the Louisiana Criminal Code as any object, which in the manner used, is likely to cause death or great bodily harm. La. R.S. 14:2(13). Thus, while the dangerous weapon does not have to be a firearm under the Aggravated Second Degree Battery statute, in this case the State limited itself to proving that a firearm (or "gun") was

the dangerous weapon through the language of the Bill of Information.

A notice was subsequently filed indicating that the State intended to seek a firearm enhancement to any sentence pronounced in this case. The firearm enhancement statute, in relevant portion, reads as follows:

> La. C.Cr.P. art. 893.3
>
> . . .
>
> D. If the court finds by clear and convincing evidence that a firearm was actually used or discharged by the defendant during the commission of the felony for which he was convicted, and thereby caused bodily injury, the court shall impose a term of imprisonment of fifteen years; however, if the maximum sentence for the underlying felony is less than fifteen years, the court shall impose the maximum sentence.
>
> . . .
>
> F. A sentence imposed under the provisions of this Article shall not be suspended and shall be imposed in the same manner as provided in the felony for which the defendant was convicted.
>
> G. A defendant sentenced under the provisions of this Article shall not be eligible for parole during the period of the mandatory minimum sentence.
>
> . . .

> As discussed above, the State had already obligated itself through the language of the Bill of Information to prove that the dangerous weapon used in this case was a firearm. In order to utilize the firearm enhancement provision of La. C.Cr.P. art. 893.3(D), the State also had to prove that bodily injury was caused by the use or discharge of the firearm by petitioner during the commission of the felony. However, in order to prove the underlying offense of Aggravated Second Degree Battery, the State was required to prove that the use of the gun had caused serious bodily injury, a requirement that was stricter than, and inclusive of, the bodily injury requirement of the firearm enhancement statute.

Thus, *in this particular case*, the elements required to be proven under the firearm enhancement statute were already covered by the Bill of Information charging the underlying offense. While the jury verdict form (Pet.'s App. 30) was insufficient to support a firearm enhancement finding in every case, again in this particular case it showed that the jury found all elements necessary to prove both the underlying offense and the firearm enhancement provisions beyond a reasonable doubt. Thus the rule set forth in *Apprendi, supra,* was not violated by the utilization of the firearm enhancement in petitioner's case and the error in the verdict form, if any, was harmless.

II. THE APPLICABLE TEST OF *DOYLE V. OHIO* WAS UTILIZED BY THE COURT OF APPEAL AND THE HARMLESS ERROR STANDARD WAS CORRECTLY APPLIED

The circumstances underlying petitioner's second argument mirror closely the factual scenario set out in *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976). In *Doyle*, the petitioners made no post-*Miranda* statements to investigators that they had been framed, an argument that they made for the first time at trial. This honorable Court found that the prosecutor's questions on cross-examination about this post-*Miranda* silence violated the petitioner's due process rights.

In this case, petitioner made no statements to the case detective at the time of his arrest. On cross-examination at trial, he testified over his counsel's objection regarding his silence and stated that it was on the advice of counsel. The prosecuting attorney pursued this line of questioning briefly in an attempt to undermine petitioner's story of self-defense, mentioned for the first time at trial. Again, in closing arguments, the prosecutor referred to petitioner's failure to mention self-defense to the investigating officer. Unlike *Doyle*, it is unclear in this case if petitioner was read his *Miranda* rights prior to his decision to exercise his Fifth Amendment rights. For purposes of its analysis, the Louisiana Second Circuit Court of Appeal assumed that petitioner had been advised of his rights per *Miranda*, thus necessitating

the application of the rule pronounced in *Doyle* to this case.

Recognizing that the questions and remarks of the prosecutor in this case were violative of the principle announced in *Doyle*, the Court of Appeal then applied the *Chapman, supra,* harmless-error analysis pursuant to this Court's ruling in *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed. 2d 353 (1993). In *Brecht*, this Court reasoned that *Doyle* violations were amenable to the harmless-error analysis on direct appeal. After concluding that the evidence against petitioner, leaving aside the objectionable testimony, was overwhelming, the Court found that the error was harmless.

The Ruling of the Court of Appeal (Pet.'s App. 16, 19) recognized the controlling jurisprudence of this Court as set forth in *Doyle, Brecht,* and *Chapman*. Furthermore, the Court of Appeal applied those principles to the facts of petitioner's case in a reasoned and credible manner. As the lower court's decision did not conflict with the decisions of this honorable Court on the federal questions presented, the granting of a writ of certiorari in this case would not be helpful in clarifying any important issues of Constitutional law.

CONCLUSION

Respondent State of Louisiana shows that the writ should not be granted in the instant case:

I. The Louisiana Second Circuit Court of Appeal did not err in applying the harmless-error standard to any *Apprendi* violations that may have resulted from petitioner's firearm sentence enhancement.

II. The Ruling of the Louisiana Second Circuit Court of Appeal was in compliance with this Court's jurisprudence and presents no federal question requiring clarification.

WHEREFORE, the State of Louisiana prays that Rodrique Bradley's application for writ of certiorari be denied.

Respectfully submitted,

CHARLES REX SCOTT
Counsel of Record
Caddo Parish District Attorney
cscott@caddoda.com

SUZANNE M. OWEN
Assistant District Attorney
501 Texas Street
Shreveport, LA 71101
Telephone: (318) 429-7618
Fax: (318) 841-4020

(3)

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STATE OF LOUISIANA,

Respondent.

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROSS E. SHACKLETTE
Louisiana Bar No. 11,960
90 Westerfield Street
Bossier City, Louisiana 71111
Telephone: (318) 222-3256
Fax: (318) 222-3256
shacklettelawyer@yahoo.com

Attorney for Petitioner Rodrique Bradley

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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CORRECTION OF RESPONDENT'S MISSTATEMENTS

1. SENTENCING ENHANCEMENT

In his Statement of the Case Petitioner stated: "The Louisiana Court of Appeal found that this jury form was incorrect but held that the existence of Louisiana Code of Criminal Procedure Article 893.3 factors was not a matter which had to be determined by a jury. (Pet.'s App. P.4)."

The Respondent in its Brief in Opposition at p.4, states that this statement was incorrect and that the Court's holding was not that broad. The Court, however found that the rule of *Apprendi* requiring any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt, not to be applicable. Thus the Court stated that:

> The offense of aggravated second degree battery carries a sentence of imprisonment at hard labor for up to 15 years. La. Revised Statute 14:34.7(B). The defendant's sentence, although apparently enhanced under La.C.Cr.P. art. 893.3, is within this range, so there is no violation in this case of the rule of *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-2263, 147 L.Ed.2d 435 (2000), because *Apprendi* only applies when the enhanced sentence is more severe than the maximum sentence for the original offense. (Pet.'s App. P.24).

2. NECESSITY OF IMPRISONMENT AT HARD LABOR UNDER UNENHANCED STATUTE

Respondent also states in its Opposition at p.6 that a sentence under La. Revised Statute 14:34.7(B) " . . . carries a sentence of imprisonment at hard labor . . . " when this statute actually provides that such sentence may be " . . . with or without hard labor. . . ." (Pet.'s App. PP.38-39).

3. CLAIM BY STATE THAT IN LOUISIANA POSSIBILITY OF SUSPENSION OF SENTENCE OR PROBATION IS AN ADMINISTRATIVE RATHER THAN A JUDICIAL FUNCTION

Respondent's Opposition also incorrectly states, without citing any law, at p.6, that

> [p]etitioner argues that because his sentence is subject to the statutory conditions of no suspension of sentence or parole pursuant to La.C.Cr.P. art. 893.3, it exceeds the statutory maximum of La. Revised Statute 14:34.7, for which suspension of sentence and parole are possible for some offenders. Whether petitioner would be otherwise eligible for suspension of sentence or parole is an open question. As this determination is not one that can be made by the sentencing judge, but instead by administrative procedures with the Department of Corrections, petitioner has not shown that the exclusion of the possibility of suspension of sentence or parole increased his maximum sentence exposure.

ARGUMENT

I. THE IMPOSITION OF ADDITIONAL PENALTIES FOR DISCHARGING OF A FIREARM THEREBY CAUSING BODILY INJURY WITHOUT THE JURY FINDING BEYOND A REASONABLE DOUBT THE NECESSARY PREDICATE FACTS CANNOT BE FOUND TO BE HARMLESS ERROR

As the Respondent notes, in the case of *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006), "Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error . . . " and may be subject to a harmless error analysis.

The State of Louisiana argues that any error was harmless because "[t]he verdict form presented to the jury (Pet.'s App. P.30), although not in perfect form, was such that all elements relevant to petitioner's conviction and sentence were considered by the jury and found beyond a reasonable doubt." (Respondent's Brief P.7). The State then quotes from the Bill of Information, which is not contained in the record, and claims that "[f]or the jury to convict petitioner of this offense, they had to find beyond a reasonable doubt that petitioner committed a battery on T.T. with a gun and thereby intentionally inflicted serious bodily injury" (Respondent's Brief P.8) and that " . . . in this case the State limited itself to proving that a firearm (or "gun") was the dangerous weapon through the language of the Bill of Information." (Respondent's Brief PP.8-9). Such an assertion is contrary to the

argument made by the District Attorney in his closing argument wherein he specifically told the jury that Rodrique Bradley " . . . just happened to have a bat, [he] just happened to have a gun, and [he] just happened to be in a situation where a fifteen-year-old is going to approach [him], and [he] am armed with not one but two weapons." (Reply App. P.2). This statement is also incorrect in that the jury was instructed that it should apply the enhancement under Code of Criminal Procedure Article 893.3(D) if it made certain findings by "clear and convincing" evidence. (Reply App. P.8).

Respondent would show that this error was not harmless because despite the State's contention that the jury had to find that a gun was used, the jury was specifically instructed by the Trial Judge that " . . . it is now my duty to instruct you on the law as applicable to this case." (Reply App. P.2) and " . . . [i]t is, however, your duty to accept the law as given to you and apply it to the facts of this case." (Reply App. PP.2-3). The court then went on to state that "[i]t is my duty to instruct you on the law covering the specific crime of aggravated second degree battery and any lesser included offenses." (Reply App. P.7) and then instructed the jury that it could convict Rodrique Bradley of Aggravated Second Degree Battery by finding that "[a]ggravated second degree battery is battery committed with a dangerous weapon when the offender intentionally inflicts serious bodily injury." (Reply App. P.7). The term "dangerous weapon" was not defined by the Trial Judge.

The error is further not subject to being found harmless in that rather than requiring a finding of guilt "beyond a reasonable doubt," Louisiana Code of Criminal Procedure Article 893.3 allows, and the jury was instructed, that it could apply the firearm enhancement if it found by "clear and convincing" evidence that certain factors existed. (Reply App. P.8). As this court stated in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) at p.602 "[t]he dispositive question, we said, 'is not of form, but of effect.' If a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." The Court reiterated this Rule in *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007), where it stated that "[t]his Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence."

Respondent also incorrectly states, without citing any law, at p.6 of its Brief, that "Petitioner argues that because his sentence is subject to the statutory conditions of no suspension of sentence or parole pursuant to Louisiana Code of Criminal Procedure Article 893.3, it exceeds the statutory maximum of La. Revised Statute 14:34.7, for which suspension of sentence and parole are possible for some offenders. Whether petitioner would be otherwise eligible for

suspension of sentence or parole is an open question. As this determination is not one that can be made by the sentencing judge, but instead by administrative procedures within the Department of Corrections, petitioner has not shown that the exclusion of the possibility of suspension of sentence or parole increased his maximum sentence exposure."

Such a statement is clearly incorrect in that La. Revised Statute 14:34.7 provides for punishment with or without hard labor for not more than fifteen years and provides for no restriction on suspension of sentence or parole eligibility, while under Louisiana Code of Criminal Procedure Articles 893.3(F) & (G) a sentence under Louisiana Code of Criminal Procedure Article 893.3 cannot be suspended and the defendant is not eligible for parole during the fifteen year minimum sentence.

II. THE ELICITING OF TESTIMONY BY THE PROSECUTION THAT RODRIQUE BRADLEY PREVIOUSLY HAD INVOKED HIS FIFTH AMENDMENT RIGHTS WAS CLEARLY NOT HARMLESS ERROR

The State of Louisiana has now conceded in its Brief that "[t]he prosecuting attorney pursued this line of questioning briefly in an attempt to undermine petitioner's story of self-defense, mentioned for the first time at trial." (Respondent's Brief P.11). Given that such questioning is clearly barred by the U.S. Constitution and since it was admittedly intended to undermine the only defense put forth by the

defendant it is respectfully submitted that such error cannot be held to be harmless.

CONCLUSION

The conflict between the Louisiana court and the decisions of this Court as to whether the Sixth Amendment applies to sentencing enhancements, including those that involve denial of probation, parole or suspension of sentence threatens the right of defendants to have all elements of their offenses decided beyond a reasonable doubt by a jury. The lower court decisions also allow prosecutors to deliberately use a defendant's invocation of his right to be silent against him. This Court should grant this Petition and resolve the conflict between the state courts of Louisiana and this Court on these issues.

Respectfully submitted,

ROSS E. SHACKLETTE
Louisiana Bar No. 11,960
Attorney at Law
90 Westerfield Street
Bossier City, Louisiana 71111
Telephone: (318) 222-3256
Fax: (318) 222-3256
shacklettelawyer@yahoo.com

Attorney for Petitioner
Rodrique Bradley

IN THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR PARISH OF CADDO
SHREVEPORT, LOUISIANA

STATE OF LOUISIANA

VERSUS

RODRIQUE ANTONIO BRADLEY

CRIMINAL CASE NO.: 248,084

TRANSCRIPT OF THE PROCEEDINGS HAD in the trial of the above-styled and numbered cause before HIS HONOR JOHN D. MOSELY, JR., Judge of the First Judicial District Court, in and for Caddo Parish, at Shreveport, Louisiana, on the 24th day of July, 2007, A.D.

APPEARANCES:

MR. RON C. STAMPS
Assistant District Attorney

MR. MICHAEL ENRIGHT
Counsel for Defendant

* * *

[81] [Mr. Ron C. Stamps] something regarding the law. The law is this: That a person who is an aggressor or who brings on a difficulty cannot claim the right of self-defense. That is the law unless he withdraws from the conflict with good faith and such in a manner that he lets the person know.

He started this. It didn't happen on Browning Street. It happened where everybody said it happened. It happened where everybody says it happened. The thing he says is, I just happened to have a bat, I just happened to have a gun, and I just happened to be in a situation where a fifteen-year-old is going to approach me, and I am armed with not one but two weapons. Is that reasonable? Not likely.

What happened was this: Mr. Bradley started the altercation and got more than what he expected. He got more than what he expected. He came expecting that he was going to do harm. He came expecting that he was going to injure that young man. And what he did, what he expected to do is what happened, is exactly what happened. He did nothing less than what he intended to do. It just so happened, I carry a gun, I just happened to be armed with a gun. He never denied even having the bat. Does that sound like a self-defense? Does that sound like self-defense? I think not. The law is clear. If you are the aggressor, you bring it on – guess what? – you can't claim self-defense. That's exactly

* * *

[87] aggressor cannot claim self-defense.

THE COURT: Ladies and gentlemen of the jury, having heard the evidence and arguments of counsel, it is now my duty to instruct you on the law applicable to this case. I am prohibited from commenting on the evidence or from giving an opinion as to what facts have or have not been proven. It is,

however, your duty to accept the law as given to you and apply it to the facts of this case. The jury in this case is the judge of the law as given to you and of the facts on the question of guilt or innocence of the accused.

Your determination of the facts must be based upon evidence presented in open court. The evidence upon which you can base your determination consists of the testimony of the various witnesses, documents received in evidence and exhibits received in evidence in this case. The statements of the district attorney and the defense attorney are not to be considered by you as evidence.

The lawyers have argued their interpretations of the law, the facts they think have proven from the evidence and from inferences based on the evidence and on their conclusions from their interpretation of the law and the facts. These opposing viewpoints are presented to you in arguments by the lawyers to assist you in your deliberations. However, the statements of the lawyers must be separated by you from the evidence admitted in [88] this case.

In making your decision, you are not to be influenced by sympathy, passion, prejudice or public opinion. You are expected to reach a just verdict. It belongs to you, the jury, and to the jury alone, to determine the weight and the credibility of the evidence. The fact that an accused stands before you charged with a crime creates no presumption against that defendant. The charge is a mere accusation

against a defendant and is not evidence of a defendant's guilt, and you must not be influenced by it in considering the case. An indictment or a bill of information is nothing more than a written, formal accusation against a defendant charging the defendant with a crime. You are not to consider the indictment or bill of information as evidence against the defendant. The mere filing of an indictment or bill of information creates no inference whatsoever that the defendant is guilty.

The defendant is presumed to be innocent until each element of the crime necessary to constitute guilt is proven beyond a reasonable doubt. The defendant is not required to prove his innocence. Thus the defendant begins the trial with a clean slate. The burden is upon the State to prove the defendant's guilt beyond a reasonable doubt.

In considering the evidence, you must give the defendant the benefit of every reasonable doubt arising out of the evidence [89] or out of the lack of evidence. If you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.

The presumption of innocence is another way of saying that is a person is not guilty until proven otherwise beyond a reasonable doubt. A legal presumption relieves the person in whose favor it exists from the necessity of any proof whatsoever. Nevertheless, a presumption may be destroyed by evidence to the contrary. In other words, a defendant in this

state need not prove his innocence. It is incumbant upon the State to prove his guilt beyond a reasonable doubt. Until so proven an accused is presumed to be innocent.

Proof beyond a reasonable doubt is a phrase that is almost self-explanatory. Reasonable doubt does not mean all possible doubt, but means doubt based upon a reason. If, after you have considered the evidence and the law applicable, there is doubt in your mind as to the guilt of the accused which doubt is based upon a reason or for which doubt you can expression a reason, then the defendant is not guilty. However, proof beyond a reasonable doubt does not mean proof to an absolute certainty.

It is your duty to determine the weight and credibility of the evidence. You may take into consideration the probability or [90] improbability of the statements of the witnesses, their opportunities for knowledge of the facts to which they testify, Their reliability in noting and remembering facts, their demeanor on the stand, the interest or lack of interest they have shown in the case and every circumstance surrounding the giving of their testimony which may aid you in weighing their statements.

If you believe that any witness in this case has willfully and deliberately testified falsely to an material fact for the purpose of deceiving, then you are justified in disregarding the entire testimony of such witness as proving nothing and as not worthy of belief. You have the right to accept as true or reject as

false the testimony of any witness in whole or in part as you are impressed with his truthfulness.

In weighing the evidence, you may determine that two different reasonable conclusions may be drawn from the evidence. Whenever facts, testimony or other evidence are such that two different conclusions may be reasonably drawn therefrom, one conclusion favorable to him and one conclusions not favorable to him, it is you duty to draw the conclusion that is favorable to the defendant.

Evidence is either direct or circumstantial. Direct evidence is evidence which, if believed, proves a fact. Circumstantial, or indirect, evidence which is [91] evidence proves a fact and from that fact, you may logically and reasonably conclude that another fact exists. You cannot find a defendant guilty solely on circumstantial evidence unless the facts proven by the evidence exclude every reasonable hypothesis of innocence.

The accused is not required to testify. And where the accused does not testify, you shall not consider this fact against him or permit it to raise any inference or presumption of guilt against him. However, if a defendant does take the stand and testify, his testimony is to be considered on the same basis as any other witness. You should consider in determining guilt or innocence only those facts testified to and brought out on trial of the case here in court.

Ladies and gentlemen, the defendant, Rodrique A. Bradley is charged with the offense of aggravated

second degree battery upon Tadarious Thomas. It is my duty to instruct you on the law on covering the specific crime of aggravated second degree battery and any lesser included offenses. Revised Statute 14:33 defines battery. Battery is the intentional of force or violence upon the person of another.

Revised Statute 14:34.7 defines aggravated second degree battery. Aggravated second degree battery is a battery committed with a dangerous weapon when the offender [92] intentionally inflicts serious bodily injury. For the purposes of this section, serious bodily injury means bodily injury which involves unconsciousness, extreme physical pain or protracted and obvious disfigurement or a protracted loss or impairment of the function of a bodily member, organ or mental faculty or a substantial risk of death.

Revised 14:34 defines aggravated battery. Aggravated battery is a battery committed with a dangerous weapon.

Revised Statute 14:34.1 defines second degree battery. Second degree battery is a battery committed without the consent of the victim, when the offender intentionally inflicts serious bodily injury. For the purpose of this article, serious bodily injury means bodily injury which unconsciousness, extreme physical pain or protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty or a substantial risk of death.

Revised Statute 14:35 defines simple battery. Simple battery is a battery committed without the consent of the victim.

Article 893.3(D), if the jury finds by clear and convincing that a firearm was actually used or discharged by the defendant during the commission of a felony or which he was convicted and thereby causes bodily injury, the Court shall impose a term of [93] imprisonment of fifteen years; however, if the maximum sentence for the underlying felony is less than fifteen, the Court shall impose the maximum sentence.

Revised Statute 14:19, use of force or violence in defense. The use of force or violence upon the person of another is justifiable when committed for the purpose of preventing a forcible offense against a person or a forcible offense or trespass against the property in who is in a person's lawful possession, provided that the force or violence used must be reasonable and apparently necessary to prevent such offense.

Revised Statute 14:21, an aggressor cannot claim self-defense. A person who is the aggressor or who brings on a difficulty cannot claim the right of self-defense unless he withdraws from the conflict in good faith and in such a manner that his adversary knows or should know that he desires to withdraw and discontinue the conflict.

Criminal intent may be specific or general. Specific criminal intent is the state of mind which

exists when the circumstances indicate that the defendant actively desired the prescribed criminal consequences to follow his act or failure to act. General criminal intent is present when the circumstances indicate that the defendant must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or [94] failure to act. General criminal intent is always present where there is specific intent.

Whether criminal intent is present, it must be determined in light of ordinary experience. Intent is a question of fact which may be inferred from the circumstances. Criminal intent need not be present for any required length of time. It is sufficient if it was present in the mind of the offender at the time of the commission of the offense. The definition of some crimes require a specific criminal intent.

The following are responsive verdicts to aggravated second degree battery: One, guilty as charged; or, two, guilty of aggravated battery; or, three, guilty of second degree battery; or, four, guilty of simple battery; or, five, not guilty.

If the State has failed to prove beyond a reasonable doubt that the defendant is guilty of the offense as charged or of a lesser responsive offense, your verdict should not be guilty. Each juror, having in view the oath taken and the duty and responsibility thereunder, should have his or her own mind convinced beyond a reasonable doubt upon all the evidence before conscientiously consenting to a

verdict of guilty on any count charged. However, this does not preclude the jurors from discussing the evidence in the case so as to assist each other in arriving at the true facts in the case.

[95] When you enter the jury room, it is your duty to consult with one another, to consider each other's views and to discuss the evidence with the objective of reaching a just verdict, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but only after discussion and impartial consideration of the case with your fellow jurors. You must be unanimous in your verdict. Six of six jurors must agree on any verdict you render in this case.

I will hand you a typewritten form of the possible verdicts you may render in this case. You will select your own foreperson whose duty it will be to conduct your deliberations, mark the line next to the appropriate verdict, date and sign the verdict form and speak for you return into court. The case is now yours to decide.

I will file a copy of the jury charge into the record.

Ms. Bush, would you hold your seat, please.

(Whereupon the jury was sequestered.)

(Whereupon a recess was taken.)

(Whereupon the defendant was present with counsel.)

THE COURT: I understand the jury has reached a verdict.

I ask that you keep all emotions to a minimum, that there be no outbursts or

* * *